IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 6262 of 2005
With
SPECIAL CIVIL APPLICATION No. 12616 of 2005

For Approval and Signature:

HON'BLE MR JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAJKOT MUNICIPALM CORPN. - Petitioner(s)

Versus

CHANABHAI AMRABHAI MAKWANA - Respondent(s)

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Appearance :
MR AK CLERK for Petitioner No(s).: 1.

MR BIPIN I MEHTA for Respondent No(s).: 1.
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CORAM : HON'BLE MR JUSTICE M.R. SHAH

Date : 25/07/2005

COMMON ORAL JUDGMENT

1. Rule. Service of Rule is waived by Shri A.K.Clerk, learned advocate on behalf of Rajkot Municipal Corporation and Shri Bipin I.

Mehta, learned advocate for workman concerned appearing vis-a-vis in both the respective petitions.

2. With the consent of the learned advocates for the parties, both these special civil applications are heard together and as both the special civil applications are inter-connected and as such, the very judgment and award is challenged in both these petitions, they are being disposed of finally by this common judgment and order.

3. So far as Special Civil Application No.6262 of 2005 is concerned, it is the petition filed by Rajkot Municipal Corporation [hereinafter referred to as the “Corporation-management” for short and brevity] challenging the judgment and award passed by the Presiding Officer of the Labour Court, Rajkot dated 29.10.2004 passed in Reference (LCR) No.1017 of 1986 in so far as partly allowing the same directing the petitioner-corporation-management to reinstate the respondent workman without backwages but with continuity of service while quashing and setting aside the action of the petitioner-corporation management in terminating services of the respondent workman.

4. So far as Special Civil Application No.12616 of 2005 is concerned,

the same is filed by the petitioner - workman [hereinafter referred to as the “workman” for short] challenging the aforesaid judgment and award passed by the Presiding Officer, Labour Court, Rajkot dated 29.10.2004 passed in Reference (LCR) No.1017 of 1986 in so far as not granting any backwages.

5. The workman was serving as Daily Wager with the Corporation Management and as it appears from the record, he worked for 3 days in the year 1983 and in all for 69 days in the year 1984-85. The workman raised the industrial dispute challenging his termination under the provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as the “I.D.Act” for short) which came to be referred to the Labour Court, Rajkot for its adjudication being Reference (LCR) No.1017 of 1986. After appreciation of evidence on record, the Labuor Court, Rajkot held that the workman has not completed 240 days in the preceding year of his alleged termination and therefore, there is no breach of Section-25-F of the Industrial Disputes Act. However, considering the fact that in the year 1995, more particularly, on 19.12.1995 onwards the some other employees came to be appointed, the Labour Court on appreciation of evidence and considering the aforesaid fact, held that there is breach of Section-25-G of the I.D.Act and accordingly, passed the award directing

the management corporation to reinstate the workman with continuity of service, however, considering the fact that the workman has worked for only for few days in the year 1984-85 as daily wager and considering the long period between termination and passing of the award, the Labour Court did not award any backwages. Being aggrieved and dissatisfied with the order passed by the Labour Court, Rajkot in so far as ordering reinstatement, the corporation management has challenged the same by way of Special Civil Application No.6262 of 2005 and being aggrieved and dissatisfied with the order with regard to not awarding any backwages, though, reinstatement order came to be passed, the workman has preferred Special Civil Application No.12616 of 2005.

6. Shri A.K.Clerk, learned advocate appearing on behalf of the corporation management has relied upon the judgment of the Division Bench of this Court in case of STATE OF GUJARAT V. RAMESH MOPABHAI RATHOD reported in 2003 (3) GLR 2590 and has submitted that when the Labour Court has held that there is no breach of Section-25-F of the Industrial Disputes Act, and that the workman has not completed 240 days in continues service, the Labuor Court has materially erred in directing the the management to reinstate the workman making Section-25-G applicable and for breach of Section-25-

G of the Industrial Disputes Act, the Division Bench of this Court in the aforesaid judgment has held that attractability or the applicability of Sections 25-G and 25-H would be dependent on the emergence and existence of the condition precedent of retrenchment, and therefore, it is requested to allow the present special civil application filed by the Corporation management. Shri Clerk, learned advocate has also further submitted that even otherwise, considering the period of days for which the workman had worked in the year 1983-84, the Labour Court was not justified in directing the corporation management to reinstate the workman.

7. Per contra, Shri Bipin I. Mehta, learned advocate appearing on behalf of the workman has tried to support the judgment and award passed by the Labour Court, Rajkot in so far as reinstatement is concerned and has further submitted that the Labour Court has committed an error in not awarding any backwages, more particularly, when it is held that action of the management is in breach of Section-25-G of the Industrial Disputes Act and therefore, the workman ought to have been awarded backwages at least from the year 1995 i.e the day on which the other workmen were appointed, more particularly, when it is specifically held that the action of the management is in violation of

Section-25-G of the Industrial Disputes Act and therefore, it is requested to allow Special Civil Application No.12616 of 2005 and to dismiss Special Civil Application No.6262 of 2005 filed by the management corporation.

8. Meeting with the arguments submitted on behalf of the workman with regard to the backwages, Shri Clerk, learned advocate for the management has vehemently submitted that as such, considering the fact that the workman has worked only for 3 days in the year 1983 and for in all 69 days in the year 1984-85 as Daily Wager, the Labour Court is justified in not awarding any backwages and therefore, it is requested to dismiss special civil application filed by the workman i.e. Special Civil Application No.12616 of 2005.

9. Meeting with the decision of the Division Bench of this Court relied upon by the management in case of STATE OF GUJARAT V. RAMESH MOPABHAI RATHOD reported in 2003 (3) GLR 2590, Shri Mehta, learned advocate appearing on behalf of the workman has submitted that in that case there was no direct question involved with regard to the applicability of Section-25-G and 25-H where the workman has not completed 240 days and there is no breach of Section-25-F of the

I.D.Act. He has submitted that the main controversy in the said case was that in fact, it was found that there was no retrenchment at all and therefore, there was no question of violation of statutory provisions of Section-25-F and in that context the Division Bench has stated that since there is no retrenchment, there would not arise question of violation of statutory provisions of Section-25-F and for that purpose, the provisions of Section-25-G and H. Even otherwise, it is submitted that as per the law laid down by the Hon'ble Supreme Court of India in case of CENTRAL BANK OF INDIA V. S.SATYAM AND OTHERS, reported in (1996) 5 SCC 419, the Hon'ble Supreme Court of India has negatived the contention that the benefit of Section-25-H is confined to the category of retrenched workmen covered under Section-25-F alone who have been in continuous service for not less than one year. It is submitted that as held by the Hon'ble Supreme Court in the aforesaid decision, Section-25-H would apply to all cases of retrenchment as defined by Section-2(oo). In support of his submission, Shri Mehta has also relied upon the judgment of the Division Bench of this Court in case of BHARAT INDUSTRIES V. KHEMIBEN VALJIBHAI AND OTHERS, 1995 (1) GLH UJ 6. It is therefore submitted that assuming that the Division Bench of this Court has held in the aforesaid decision the STATE OF GUJARAT V. RAMESH MOPABHAI RATHOD, 2003 (3)

GLR 2590 that for attracting Section-25-G and H, retrenchment under Section-25-F is must and in that case, as law laid down by the Hon'ble Supreme Court on the issue has not been considered by the Division Bench and attention of the Division Bench of this Court was not drawn to the aforesaid decision, the same is required to be treated as per incuriam in view of the binding judgment of the Hon'ble Supreme Court in case of CENTRAL BANK OF INDIA VS. S. SATYAM AND OTHERS, (1996) 5 SCC 419. It is therefore further submitted that even otherwise on plain reading of Section-25-F and 25-G and Section-25-H of the Industrial Disputes Act, all are different independent Sections and even where it is found that the workman has not completed 240 days in the last preceding year and there is no breach of Section-25-F, if ultimately it is proved that some other persons are appointed subsequently ignoring the workman concerned, then in that case, straightaway Section-25-G would be made applicable and therefore, it is requested not to consider the cited judgment rendered by the Division Bench of this Court which takes contrary view to the judgment of the Hon'ble Supreme Court.

10. Per contra, lastly, Shri A.K.Clerk, learned advocate for the management corporation has submitted that in view of the binding

decision of the Division Bench of this Court referred to hereinabove which takes the view that for attracting Section-25-G & H, retrenchment under Section-25-F is must and if this Court is not in agreement with said view laid down by the Division Bench of this Court, then in that case, the petition should be referred to the larger bench.

11. Heard the learned advocates for the parties.

12. The Labour Court on appreciation of the evidence and considering the fact that the workman has worked only for 3 days in the year 1983 and for 69 days in all in the year 1984-85 as Daily Wager, has held that as the workman has not completed 240 days in the preceding year of retrenchment, there is no breach of Section-25-F of the Industrial Disputes Act. However, considering the fact that new employees came to be appointed on 19.12.1995, the Labour Court has on appreciation of evidence held that there is breach of Section-25-G of the I.D.Act by not calling upon the workman for reemployment. This is finding of fact arrived at by the Labour Court on appreciation of evidence which is not required to be interfered by this Court in exercise of the powers under Articles 226 and 227 of the Constitution of India. Under the circumstances, finding given by the Labour Court that there is

breach of Section-25-G of the I.D.Act, in my opinion, is not required to be disturbed and the same is not disturbed and is accordingly confirmed.

13. The next question is with regard to the contention raised on behalf of the management relying upon the judgment of the Division Bench of this Court in case of STATE OF GUJARAT V. RAMESH MOPABHAI RATHOD, 2003 (3) GLR 2590 that for attracting and applicability of Section-25-G and 25-H of the I.D.Act, retrenchment covered by Section-25-F is must, is required to be considered by this Court. Firstly, it is required to be noted that in the said case, the said controversy was not directly involved and on facts, it was found that there was no retrenchment by the employer at all and the Division Bench was considering the same and has made the passing observations which reads as under :

> ***"Apart from that, the attractability or the applicability of Sections-25-G and 25-H would be dependent on the emergence and existence of the condition precedent of retrenchment."***

The aforesaid observation seems to be concerning the facts of that case where it was found that there was no retrenchment at all by

the employer. Therefore, contention of Shri Clerk, learned advocate for the management corporation that for applicability and attractability of Sections-25-G and 25-H, retrenchment covered by Section-25-F is must, is not correct and cannot be accepted. Even otherwise, as held by the Hon'ble Supreme Court of India in case of CENTRAL BANK OF INDIA (Supra), benefit of Section-25-H would not be confined to the category of the retrenched workmen covered by Section-25-F alone who have been in continuous service for not less than one year. It appears from the judgment and order passed by the Division Bench of this Court relied upon by Shri A.K.Clerk, learned advocate appearing on behalf of the management corporation, attention of the Division Bench was not drawn to the decision of the Hon'ble Supreme Court in case of CENTRAL BANK OF INDIA (Supra) and the Division Bench has not considered the said binding decision.

14. At this stage, the judgment of the Hon'ble Supreme Court in the case of GOVT OF A.P. V. B. SATYANARAYANA RAO, reported in (2000) 4 SCC 262 is required to be considered. While considering the rule of per incurim, the Hon'ble Supreme Court in the said decision in para-8 has held as under :

"The rule of per incuriam can be applied where a court

omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."

15. There is one another decision of this Court also in case of BHARAT INDUSTRIES V. KHEMIBEN VALJIBHAI AND OTHERS, 1995(1) GLH (UJ) 6 where also, similar view is taken with regard to applicability of Section-25-G and 25-H to those employees irrespective of completion of 240 days and / or retrenchment as envisaged under Section-25-F of the I.D.Act. Considering the fact that the Division Bench of this Court in cited decision of STATE OF GUJARAT V. RAMESH MOPABHAI RATHOD, 2003 (3) GLR 2590 has not considered the decision of the Hon'ble Supreme Court in case of CENTRAL BANK OF INDIA (Supra) which is a superior court judgment, assuming that the same meaning is to be given to the judgment of the Division Bench in case of STATE OF GUJARAT V. RAMESH MOPABHAI RATHOD as suggested on behalf of the management, in that case also, considering the judgment of the Hon'ble Supreme Court, the same is not required to be considered treating it as per incuriam.

16. Now the next question which is required to be considered is with regard to the issue, whether the workman is entitled to any backwages or not ? It is required to be noted that the workman has worked only for 3 days in the year 1983 and in all for 69 days in the year 1984-85 as daily wager and he was not called for duty and/or offered work in the year 1985 and new employees came to be appointed on 19.12.1995, therefore, as such, the case for the workman to get re-employment has arisen only on 19.12.1995 as at that time the workman was to be offered the work, therefore, till then, obviously there was no question of offering him work and consequently, the workman is not entitled to any wages upto 19.12.1995. Therefore, the question is required to be considered with regard to the backwages after 19.12.1995.

17. In the recent decision of the Hon'ble Supreme Court of India in case of GENERAL MANAGER, HARYANA ROADWAY V. RUDHAN SINGH, JT 2005 (6) SC 137 while considering the question of awarding the backwages to the workman who was serving as daily wager as Helper who worked for less than one year and in case where it was found that the employer did not follow the requirements of Section-25-F of the I.D.Act and when the Tribunal directed reinstatement with 50 % of the backwages, the Hon'ble Supreme Court has held that the order of

payment of backwages should not be passed in a mechanical manner but all such factors are to be taken into consideration before passing any such order and the Hon'ble Supreme Court did not grant any backwages. It was the case where the respondent workman had worked for very short period which was less than one year and during that period, there were breaks in service and workman was given short term appointments on daily wage basis in different capacities and the workman was not a technically trained person but was working on Class-IV Post. Here, in the present case as stated hereinabove, the workman has worked for only 3 days in the year 1983 and in all for 69 days in the year 1984-85 as daily wagers and new employees came to be appointed on 19.12.1995 i.e after period of ten years of his termination and for that, the workman cannot be awarded full backwages even for ten years counting from 19.12.1995. However, considering the fact that though the workman was required to be offered work on 19.12.1995 and as such, there is no specific finding by the Labuor Court that the workman was in fact gainfully employed during the interregnum period and having regards to the facts and circumstances of the case, it is held that the workman is entitled to 25 % of the backwages from 19.12.1995 only. The backwages to be calculated considering the average working days of the workman who has / have

been appointed on 19.12.1995 and/or thereafter.

18. In view of above discussion, Special Civil Application filed by the workman being Special Civil Application No.12616 of 2005 deserves to be partly allowed to that extent and the judgment and award passed by the Labour Court, Rajkot dated 29.10.2004 passed in Reference (LCR) No.1017 of 1986 is modified to the aforesaid extent.

19. For the reasons stated above, Special Civil Application No.6262 of 2005 filed by the management-corporation is hereby dismissed, whereas, Special Civil Application No.12161 of 2005 is partly allowed. The judgment and award passed by the Labour Court, Rajkot dated 29.10.2004 passed in Reference (LCR) No.1017 of 1986 is modified to the extent that the workmen will be entitled to 25 % of the backwages with effect from 19.12.1995 to be calculated as stated hereinabove and to that extent Rule is made absolute. However, there will be no order as to costs in both these special civil applications.

[M.R.Shah, J.]

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